

LIVING IN INTERESTING TIMES: LANDONLINE, LEADER IN ITS FIELD AT WHAT COST?

*Ben France-Hudson**

I. Introduction

For many conveyancers working when Landonline suffered yet another crash in late November of 2005, the old Chinese curse, 'may you live in interesting times', must have sprung to mind with nightmarish reality. There can be no doubt that these are interesting times to be working in the area of conveyancing. It is increasingly clear that the defining feature of conveyancing practice in the twenty-first century will be the utilisation of electronic means to lodge data, to register dealings, and to record changes to title.¹ Improvements in computer technology and the advent of the internet have led to a push for computerisation of the land registration process. Several jurisdictions, including New Zealand, Canada, Australia and England and Wales, are contemplating, or have already made, the change.² The computerisation of land registration and land information systems is an inevitable consequence of the global penetration of computers into everyday transactions.³ As demands for more efficient and less expensive legal transactions have increased, so there have been inexorable moves to improve earlier technology. Yet it seems that the risks for practitioners may have increased alongside the rapid development of the new automated system.

* BMus(Hons) perf(Griffith), LLB(Hons)(Cant), MMus(Cant).

¹ L Griggs, 'Torrens Title in a Digital World' (2001) 8 *Murdoch University Electronic Journal of Law* 1.

² R Low, 'Maintaining the Integrity of the Torrens System in a Digital Environment: A Comparative Overview of the Safeguards Used Within the Electronic Land Systems in Canada, New Zealand, United Kingdom and Singapore' (2005) 11 *Australia Property Law Journal* 4.

³ S Christensen, 'Electronic Land Dealings in Canada, New Zealand and the United Kingdom: Lessons for Australia' (2004) 11 *Murdoch University Electronic Journal of Law* 2.

The purpose of this paper is to explore the changes to the conveyancing system ushered in by the advent of an automated register. The focus is on two areas of particular interest. First, what is the potential for, and effect of, fraud or mistake under an automated register? Second, what are the consequences of a technical failure? The article begins by revisiting the themes of Sir Robert Torrens and the impetus for his reforms. While Torrens was active over 150 years ago, modern day conveyancers lose sight of his philosophies at their peril. It is important to bear his thoughts in mind throughout the remainder of the discussion. Next is a comprehensive examination of the processes for registering an electronic instrument in Ontario, British Columbia, England and Wales, Australia and New Zealand. It is hoped that the contrasts between these systems will be highlighted, especially the fact that in all except New Zealand the Registrar still plays an important role by examining documents submitted for registration. This will be important for the discussion of fraud and mistake which then follows. Fraud and mistake have always functioned as the principal exceptions to indefeasibility and remain two of the main obstacles to a truly certain register. As such, a large part of this paper is devoted to an inquiry into how fraud, and to a lesser extent mistake, will be affected by the move to electronic conveyancing. It will be indicated that those of a criminal persuasion will employ both old and new types of fraud, and that the risk of this should not be underestimated in the new environment. In order to assess these risks, an examination of the safeguards under the old paper based system, the duplicate certificate of title and the inspection of instruments by the titles office, will be undertaken. A recent article from the *New Zealand Herald* will be used to illustrate that the risk is real and contemporary. Moreover, it will be submitted that while the risk of fraud due to the abolition of the duplicate certificate of title can be overstated, the absence of a final check by the Registrar has the potential to have a profound effect on the compensation provisions of the *Land Transfer Act 1952*. In order to illustrate this, it will be necessary to examine the attestation or certification requirements specified by Landonline. This examination will include a detailed

analysis of how the digital signature system works and an assessment as to whether it is safe. The position in New Zealand will be contrasted with that in other jurisdictions, making the point that it is only in New Zealand that the practitioner is actually certifying that identities are correct and information is accurate. In other jurisdictions a practitioner is only certifying that appropriate inquiries have been made. Furthermore, New Zealand is the only jurisdiction in which conveyancers have the power to update the register without examination by the Registrar. The effect of this on the operation of the compensation provisions of the *Land Transfer Act 1952* will be explored. In addition, the provisions for removing mistakes from the register will be examined. These mistakes could range from misdescription of easements to registration of mortgages over Maori Freehold Land without the endorsement of the Maori Land Court. It is anticipated that this will demonstrate a great deal of uncertainty surrounding both the Registrar's and the High Court's powers of correction in the new electronic environment. An attempt will be made to show that a practitioner's liability may have increased in the areas of both fraud and mistake. It will be concluded that the new system has grossly undermined the protections afforded by the Torrens scheme, and that an extraordinary amount of risk has now been placed on conveyancers. The second part of the paper will focus on an assessment of the consequences of a technical failure of the automated register. Case law from Queensland will be examined. This will be used to illustrate the fact that contractual terms in agreements for sale and purchase may be the subject of litigation, and that there has been little, if any, examination of the effect an electronic system will have on such litigation. To demonstrate potential problems, three areas of contract law will be looked at briefly to show some of the effects an interruption to services at an inopportune moment may have. It will be submitted that a party should not be entitled to rely on a failure, however long, to repudiate a contract for the sale of land. A solution will be suggested along the lines of that advocated by the Law Commission of British Columbia in its report, *The Legal Consequences of a Temporary Land Title Office Shutdown*. It

will be submitted that unless action is taken to solve these problems, there is a further risk to conveyancers who are currently forced to make large undertakings in the event of technical failure. It will be suggested that, as in British Columbia, New Zealand should take urgent legislative action to ensure that these problems are avoided.

Finally, a number of points to ponder will be raised. The first of these encompasses an exploration of the myths surrounding the perceived advantages of an electronic register, such as, the reduction in costs and paper. Secondly, the point will be made that in the current climate of decreasing prices in professional indemnity, the decreases may halt quite suddenly if insurers were aware of the risks practitioners expose themselves to by participating in the Landonline system. The last point will be a small but poignant one: it was Sir Robert Torrens' intention that the monopoly that lawyers have in land dealings should be broken. However, it would seem that the electronic system might make lawyers the exclusive agents of dealings in land once again.

The paper will conclude that New Zealand has adopted a very advanced form of automated register which *will* have an effect on traditional conveyancing practice. Land Information New Zealand is a leader in its field but the cost of this leadership may be increased uncertainty, increased risks, and increased costs for those who practice in this area. It will be submitted that in further refining this system, practitioners and lawmakers should act to address these issues and create a truly effective, secure and inexpensive system, which adheres to the fundamental tenets of the Torrens system.

II. The Torrens System

The major concern raised by commentators about the development of an electronic register has been how to ensure the maintenance of the underlying principles of the Torrens system within an electronic

environment.⁴ The history of the Torrens scheme and the development of our modern land registration system are well documented elsewhere. However, it is useful to briefly revisit the cardinal themes underlying the registration of land in New Zealand.

Sir Robert Torrens listed five 'principal grievances' resulting from the English law of real property that the *Real Property Act 1857* (SA) sought to eliminate: its complexity; its heavy costs; the 'losses and perplexity' for purchasers and mortgagees because of uncertainty relating to the validity of titles; the slowness of the conveyancing process which was unsuited to the requirements of a progressing community; and, the diminution of the value of land as a secure and convenient basis of credit.⁵ Under the old system of conveyance by deed, there was no certainty that the purchaser was acquiring good title to the land unless the validity of each document in the chain of title could be established.⁶ Torrens thought that the title to land held under the old system was '[n]o stronger than its weakest link ... each transaction adding a fresh link increasing the perplexity and the risk of loss.'⁷ Torrens promised that the new system would have four 'grand characteristics' - certainty, economy, simplicity and facility.⁸ The modern development of his system is noted for five fundamental qualities: certainty of title; integrity of title; reliability; simplicity; and, economy. The fundamental principle of the system is that registration confers an *indefeasible title guaranteed by the State*.⁹ Once title is registered, absolute security of title is guaranteed to the registered owner. The fundamental qualities are achieved by three simple principles which underpin the system.¹⁰

⁴ Ibid 6.

⁵ AG Lang, 'Computerised Land Title and Land Information' (1984) 10 *Monash University Law Review* 196.

⁶ R R Torrens, 'Speech Introducing the *Real Property Bill 1857* (S A), South Australian Parliament, 4 June 1857', cited in S Christensen & A Stickley, 'Electronic Title in the New Millennium' (2000) 4 *Flinders Journal of Law Reform* 217.

⁷ R R Torrens, *The South Australian System of Conveyancing by Registration* (1859) 9.

⁸ R R Torrens, 'Election speech in 1857', cited in AG Lang, 'Computerised Land Title and Land Information' (1984) 10 *Monash University Law Review* 196.

⁹ Christensen, above n 3, 6.

¹⁰ T B F Ruoff, *An Englishman Looks at the Torrens System* (1957).

1. The 'mirror principle.' This principle arises from the use of a central registry where each parcel of land is recorded in a separate folio in the register. The register operates as a mirror to accurately and completely reflect all interests in the land material to the owner's title.
2. The 'curtain' principle. This states that the purchasers of land should not concern themselves with trusts and other interests lying behind the curtain of the register; and
3. The 'insurance' principle, which holds that if the mirror of title gives an incorrect reflection and as a result a person incurs loss, that loss should be met by the state.¹¹

These principles utilised together provide the other essential qualities of reliability, simplicity, and ease of use. They allow any person to discover all the interests or encumbrances to which land is subject by searching the register. This is all they need do and they can search in the sure and certain knowledge that they will be compensated for any loss.¹² 'The beauty of the system is that it substitutes registration for any inquiry into actual or constructive notice of facts about ownership.'¹³ It is the act of registration which establishes indefeasible title. As Sir Robert Torrens stated, 'Registration *per se* and alone shall give validity to transactions affecting land'.¹⁴

III. Electronic Registration Around the World

As Sir Robert's system has matured, it has proven extremely adaptable and secure. It has been adopted by many jurisdictions around the world and proved itself successful in each. Before moving

¹¹ T Bennion, D Brown, R Thomas, & E Toomey, *New Zealand Land Law* (2005) 39.

¹² Christensen, above n 3, 7.

¹³ CD Bostick, 'Land Title Registration: An English Solution to an American Problem' (1987) 63 *Indiana Law Journal* 55.

¹⁴ Torrens, above n 6.

to examining some of the potential effects that electronic conveyancing might have on the Torrens scheme, it is useful to illustrate how the various electronic registry systems work around the world.

Ontario

Since the late 1980s, Ontario has developed and implemented a range of electronic systems for the lodgement and registration of interests in land.¹⁵ It began when the Ontario Ministry of Consumer and Commercial Relations began building the Province of Ontario Land Registration Information System (POLARIS), with the objective of automating Ontario's land registration.¹⁶ Initially users were able to remotely search titles and eventually this was expanded to include electronic registration of land title documents. By April of 2004, automated records were available in 28 of the province's 54 land registry offices. Where it is available, 95% of all registrations are now submitted electronically.¹⁷ The system includes a land registration database and a web-based gateway for registration hosted by a third party provider, Teranet Land Information Services Inc (Teranet).¹⁸ The web-based system allows lawyers, banks, conveyancers and members of the public to register dealings electronically, provided they have an account with Teranet. As in New Zealand, registration of documents in Ontario is a two-step process in which both parties must confirm, first, that the documents are complete and, second, that they are ready to be released for registration. On the day of closing, all funds and all nonregistration documents are exchanged and the electronic documents will be released once the appropriate funds have been received.¹⁹ The system allows conveyancing documents (transfers, charges, mortgages, discharges and documents general) to be prepared directly on the office computer using a series of prompts built into the system. The user must identify the

¹⁵ Christensen, above n 3, 2.

¹⁶ Ibid.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ M E Kowalski, 'Electronic Registration in Ontario: Shades of Things to Come for British Columbia' (2001) 59 *The Advocate* 391.

type of document he or she wants to create and register.²⁰ Certain fields of information, such as the address, the current owner's name and the legal description of the property, are automatically pre-populated into the document from the POLARIS database.²¹ After preparing the document, the lawyer makes it available electronically to the lawyer representing the other party. The first lawyer can grant the second an update capability so that the second lawyer can make changes to the document where required.²² Once the authority of the client is obtained, the lawyer for each party certifies the information as complete by attaching his or her electronic signature.²³ Evidence of client consent and authorisation is provided by a document called Acknowledgement and Direction. The form gives the solicitor authority to proceed with the transaction and to complete and electronically sign the document on behalf of his or her clients.²⁴ In Ontario there is a presumption that the documents have been properly authorised and consented to, a presumption that is rebuttable by the parties to the transaction and evidenced by the document. There is no legislative requirement that proof of authority be obtained prior to registering a document. Each solicitor must act prudently to ensure that he or she has proper authorisation for registration. To assist in this, the system automatically prepares and prints an Acknowledgment and Direction. This is somewhat like a power of attorney. It is executed by the parties and authorises registration. Execution of this document is prudent but it is also entirely optional.²⁵

When the lawyer who has prepared the documents is ready to release the documents for registration, the lawyer must sign the documents for release. The lawyer who has prepared the document, a conveyancer or another user, can add the release signature.²⁶ This indicates that the document is

²⁰ Low, above n2, 6.

²¹ Christensen, above n 3, 2.

²² Low, above n2, 6.

²³ Christensen, above n 3, 2.

²⁴ Low, above n2, 6.

²⁵ Kowalski, above n 19, 391.

²⁶ Christensen, above n 3, 2.

complete and that the transaction can proceed further.²⁷ All registration documents are sent electronically to the relevant registration office and instantaneously checked upon receipt to ensure that they comply with all administrative requirements.²⁸ An escrow closing procedure is required because there is currently no ability to electronically move purchase and sale funds between parties. The Document Registration Agreement (DRA) sets out this closing procedure. The DRA is signed by the parties' lawyers. They obtain authorisation to enter into the DRA through the client's execution of the Acknowledgement and Direction. The lawyer who has entered into a DRA gives an undertaking pursuant to that agreement. The lawyer must therefore comply with rule 6.03(8) of *The Law Society of Upper Canada's Rules of Professional Conduct*,²⁹ which provides that a lawyer shall not give an undertaking that cannot be fulfilled and shall fulfil every undertaking given.³⁰ It is important to note that the system is limited to the electronic submission of documents and does not encompass automated registration. Staff at the Land Titles office must certify the document before it is officially registered and if the document is a Transfer or other change of ownership document, Land Titles office staff must manually update the ownership field of the register.³¹ The Ontario system does not create any substantive changes to the law with respect to real property, nor does it significantly alter the steps taken by a solicitor in connection with a typical real property transaction. Instead it refines the process of the typical transaction and theoretically makes registering interests in land cheaper, easier, faster, more accurate and more efficient.³² In order to make a registration against land under the system, one must either have an account with Teranet or bring appropriate identification to the local land registration office and, with the assistance of the Registrar, effect

²⁷ Low, above n 2, 6.

²⁸ Kowalski, above n 19, 391.

²⁹ Available from <http://www.lsuc.on.ca/regulation/a/profconduct/>.

³⁰ Low, above n 3, 9.

³¹ Ibid 6.

³² Kowalski, above n 19, 389.

the registration. Teranet places no significant restriction upon those who may open an account.³³ The only restriction relates to the registration of documents that contain statements of law. Statements of law can be made only by a lawyer in good standing, and so documents that require a statement of law cannot be registered without the assistance of a lawyer.³⁴

British Columbia

In British Columbia, the Land Title Branch commenced its Electronic Filing System on 1 April 2004.³⁵ The system enables authorised users to electronically submit land title documents for registration. As with Ontario, users must have an account with BC Online. However, users are required to download forms and have the form signed by the client in paper prior to uploading it as a PDF file for the system to read electronically. This allows the parties to upload a document for registration rather than lodging a paper copy at the Titles Office counter.³⁶ In contrast to both New Zealand and Ontario, in British Columbia, by law, a true paper copy of the electronic document is required to be executed and witnessed.³⁷ Section 168(3) of the *Land Title Amendment Act (1999)* prohibits registration unless the true copy is printed, executed and witnessed. This requirement ensures that the parties consent to and authorise the document, thus conforming with the execution requirements of Part 5 of the *Land Title Act [RSBC 1996]*. If registration is made without the paper copy being printed, executed and witnessed, the registering solicitor or notary is liable for criminal penalties even if no fraud has occurred and no damage has been suffered. Interestingly enough, despite the prohibition, once registered, an electronic deed for which a true copy was not executed or witnessed still conveys an indefeasible title, subject to fraud and other exceptions.³⁸ The

³³ Ibid 390.

³⁴ Ibid.

³⁵ Christensen, above n3, 3.

³⁶ Ibid.

³⁷ Kowalski, above n 19, 392.

³⁸ Ibid.

conveyancing process begins with the purchaser's lawyer or notary conducting a search of the vendor's title and downloading the required form from BC Online. The structure and subject matter of these electronic forms, which are in Adobe Acrobat format and designed to be filled out using Adobe Acrobat 6, has not changed from the existing paper forms, but additional functionality has been added.³⁹ The forms are downloaded in an electronic form and saved to the firm's computer. The purchaser's lawyer then fills in the predetermined fields. The lawyer will then transmit the relevant electronic documents to the vendor's lawyer. This lawyer can view the document and make changes where necessary.⁴⁰ The next step is for the vendor's lawyer or notary to print a copy of the forms and to attend on execution by the vendor, that is, the vendor's lawyer witnesses the execution of the paper copy of the transfer by the vendor and will sign the transfer as certifying officer.⁴¹ The copy is evidence of the vendor's intention to be bound, has the effect of delivery and is an instruction to his or her lawyer or notary to authorise submission for registration.⁴² The vendor's lawyer will then incorporate his or her electronic signature into the electronic form. This incorporation is a certification by the lawyer that a true copy of the electronic instrument has been executed and witnessed in accordance with Part 5 of the *Land Title Act [RSBC 1996]* and that the true copy is in the possession of the person who incorporated the electronic signature.⁴³ The vendor's lawyer/notary then has to electronically forward the form back to the purchaser's lawyer/notary. Once an electronic signature is incorporated, the form can be submitted for filing by any party who has access to BC Online, for example, the lawyer's staff or third parties such as registration agents.⁴⁴ When the Land Title office receives the form, the system will automatically ensure that the electronic signature matches the copy of the certificate on file with the Law Society. As long as the certificate has not been

³⁹ Low, above n 2, 11.

⁴⁰ Christensen, above n 3, 3.

⁴¹ Low, above n 2, 11.

⁴² Christensen, above n 3, 3.

⁴³ Ibid.

⁴⁴ Low, above n 2, 14.

revoked, this authenticates the electronic signature of the lawyer and means that he or she is a member in good standing with the Law Society.⁴⁵ The electronic form is converted to an image, examined by an examiner and registered as in the paper transaction.⁴⁶

England and Wales

England and Wales do not have a conveyancing structure based on the Torrens system. Title Registration has in fact had a difficult history in this jurisdiction with many practitioners being resistant to the idea.⁴⁷ Until recently the primary legislation allowing for the registration of land was the *Land Registration Act 1925*. It is not easy to see how the registration scheme set up under this Act differs from that established by Torrens. However, the fact that land does not have to be registered, the extent of overriding interests, the management of unregistered burdens, and the position of indefeasibility (which is treated as a guarantee of indemnity when title is upset, rather than the principle that a registered title is unassailable) suggest that the systems are very different.⁴⁸ Nevertheless, the new *Land Registration Act 2002* has shifted the emphasis from registration of title to title by registration. This would appear to indicate a move toward the Torrens system, and to an extent it does, but it is perhaps best seen as a subtle shift to what can only be described as a hybrid form of title registration.

One of the revolutionary aspects of the new Act is its provision for a complete overhaul of the land registration system with an emphasis on the introduction of electronic conveyancing.⁴⁹ The Land Registry has plans to introduce a paperless system which will: provide for electronic contracts of sale and electronic transfer and mortgage deeds; eliminate the registration gap; handle chain sales

⁴⁵ Christensen, above n 3, 3.

⁴⁶ Ibid.

⁴⁷ E Cooke, 'E-Conveyancing in England: Enthusiasms and Reluctance' in D Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) 277.

⁴⁸ Ibid 280.

⁴⁹ M Gerrard, 'E-as-y as houses?' (2002) *Law Society Gazette* 30.

transparently; be potentially more secure and fraud resistant than at present; and, provide for automatic simultaneous money transfer for settlement.⁵⁰ These plans are as yet in their infancy. Only the release of mortgages by financial institutions is occurring at this time, with the successful completion of the Land Registry's pilot of a system called Electronic Discharges, which allows mortgage lenders to discharge some of their registered charges electronically.⁵¹ The Law Society of England and Wales in its consultation papers has raised some interesting concerns regarding an electronic register. In particular, they are concerned about using electronic signatures to sign documents (see further below). These concerns have the potential to impact on users of an electronic register in a Torrens environment, hence the inclusion of England and Wales in this discussion.

Australia

The Registrars of Title throughout Australia have formed a collaborative group for the purpose of developing electronic lodgement and registration systems in each Australian state.⁵² While Victoria is developing the most advanced system, it has yet to implement any of its plans. A limited pilot of the system is currently scheduled for 2006.⁵³ New South Wales has produced a consultation paper for stakeholders but has yet to make any concrete moves towards implementation.⁵⁴ Queensland's *Land Title Act 1994* was designed to achieve the dual role of effecting substantive change to the law and also to facilitate the integration of information technology principles into the system. The principle step in relation to the latter was the elimination of the duplicate certificate of title except in certain circumstances.⁵⁵ The current system allows parties to search and obtain historical data and to submit

⁵⁰ Christensen, above n 3, 4.

⁵¹ Ibid.

⁵² Ibid.

⁵³ Land Exchange Victoria, *What is EC* (2006) <http://www.landexchange.vic.gov.au/ec/about/index.html> at 13 January 2006.

⁵⁴ Christensen, above n 3, 4.

⁵⁵ R Cocks & J Barry, 'Electronic Conveyancing: Challenges for the Torrens System' (2001) 8 *Australian Property Law Journal* 2.

completed instruments in electronic form for registration via optical character recognition. Once received, the imaged documents are acknowledged electronically and scanned to extract essential data for recording on the register. This is similar to the process operating within the British Columbia registry, albeit in a more refined electronic form.⁵⁶ In terms of technology, the Registrar adopted the policy of electronic lodging of scanned information, such that the register consists of an electronic title and, pending registration, a series of electronic documents that are examined by Title Office staff. If the electronic document is acceptable, the information is then recorded by Titles Office staff on the register and the electronic title is updated.⁵⁷ Although the register exists in electronic form, this model is not a fully electronic lodgement system. Information is still required to be prepared in a paper format for signing and scanning.⁵⁸

New Zealand

New Zealand has introduced a system similar to that in Ontario. The system is known as Landonline, and is administered by Land Information New Zealand (LINZ).⁵⁹ The process of creating and lodging an electronic dealing, called an eDealing, includes the following steps: create dealing; prepare; certify and sign; settle and release; and, submit and register.⁶⁰

Create an eDealing

An eDealing is created electronically using electronic templates in a shared workspace where many details, such as the current owner's name, are entered automatically onto the electronic template from the titles register. The workplace is a 'cyberfile' used to create and manage all aspects of each

⁵⁶ Christensen, above n 3, 5.

⁵⁷ Cocks & Barry, above n 55, 2.

⁵⁸ Christensen, above n 3, 5.

⁵⁹ Ibid 3.

⁶⁰ Ibid.

eDealing, including searching, preparing instruments and messaging.⁶¹ In the workspace, the conveyancers can view and manage eDealings created by themselves or other members of the firm. Conveyancers can also interact with other practitioners by going to the workplace to prepare documents for registration. The workspace is maintained by LINZ. Once registration is effected, all information disappears from the shared workspace.⁶²

Pre-validation

Once prepared, an eDealing can be pre-validated. It is checked to ensure that the dealing will pass registration if submitted in its present state. When an instrument is pre-validated, it will pass (but for signing) if it is correct.

The status screen will show the status 'draft' for unsigned instruments and 'signed' for signed instruments. An incorrect dealing can be amended rather than having to wait until it is rejected and returned.⁶³

Certification and signing

To submit an eDealing, the instrument must be certified and electronically signed using a digital certificate. Only conveyancers⁶⁴ who are nominated on the Authority and Instruction form (A&I) can certify and sign the eDealing. They must have a digital certificate and appropriate privilege allocated within the firm.⁶⁵ Section 164A(3) of the *Land Transfer Act 1952* requires every electronic instrument to contain certification specifying:

⁶¹ New Zealand Law Society, *Guidelines of the use of Landonline for an Electronic Transaction (eDealing)* <http://www.nz-lawsoc.org.nz/PDFs/edeal-glides-200204.pdf> at 15 November 2005.

⁶² Low, above n 2, 18.

⁶³ Ibid 19.

⁶⁴ As defined in s 4 of the *Land Transfer (Computers Registers and Electronic Lodgement) Amendment Act 2002*.

⁶⁵ Christensen, above n 3, 4.

- (a) The person giving the certification has authority to act for the relevant party and that party has legal capacity to give such authority; and
- (b) The person giving the certification has taken reasonable steps to confirm the identity of the person who gave the authority to act; and
- (c) The instrument complies with any statutory requirements specified by the Registrar for that class of instrument; and
- (d) The person giving the certification has evidence showing the truth of the certifications in paras (a)-(c) and that the evidence will be retained for the period prescribed for the purpose by regulations made under this Act.

Under Rule 3.03 of the *Rules of Professional Conduct for Barristers and Solicitors*, a practitioner must take reasonable steps to ensure that any certification given by that practitioner under s 164A of the *Land Transfer Act 1952* is correct and complies with the statutory requirements. The New Zealand Law Society guidelines also specify that every lawyer certifying and signing an instrument must be satisfied personally that the authorisation from the client(s) is in order, that the identify of the clients(s) has been established to the lawyer's satisfaction, and that all certifications relating to the instrument are true and correct.⁶⁶ Thus, the A&I, which must be completed by clients before certification and signing of a transaction, is the lawyer's proof of authority to act on behalf of a client in implementing the eDealing and provides protection against later challenges to the transactions. The form proves that the conveyancer has the right to act on behalf of clients and provides a record that clients are who they say they are. Furthermore, and crucially, it establishes that the conveyancer has authority to update the title register.

⁶⁶ New Zealand Law Society, above n 61.

Settle and release

Once both conveyancers are satisfied, the dealing can proceed and they can settle. This allows for the instruments to be released. When all the instruments have been released, the dealing can be electronically submitted to LINZ.⁶⁷

Submit

The eDealing is submitted electronically to LINZ using Landonline and lodgement priority date and time is assigned.⁶⁸

Registration

Upon registration, Landonline runs automated checks. If the dealing passes it is *registered immediately and the titles register is automatically updated without manual intervention by LINZ*. The submitting conveyancer receives an electronic notice confirming registration. If the dealing is rejected, it is returned to the shared workspace so that it can be modified and re-submitted.⁶⁹

IV. Fraud and Mistake

In light of these varying systems, it is now possible to examine the potential for, and effect of, fraud and mistake under the Landonline system. One of the most vociferous arguments raised against the introduction of electronic conveyancing was a possible increase in fraudulent practices. Essentially, commentators argued that by allowing internet access to a lodging system that provides a gateway to the land registry, there are greater possibilities for both traditional and new computer related

⁶⁷ Low, above n 2, 22.

⁶⁸ Ibid.

⁶⁹ Ibid.

fraudulent practices.⁷⁰ This increased risk, they argued, had the potential to threaten the fundamental concepts of security and integrity of title. To an extent this is true. While fraudulent practices have developed in the paper based Torrens system, the use of technology opens opportunities not only to commit the same types of fraud but also the prospect of new methods being invented.⁷¹ The problem of identity fraud and the security and integrity of electronic databases is particularly pertinent to an electronic registration system where all dealings are done online and the titles are held in a computerised format in an electronic database.⁷² In the past, sophisticated paper based systems were present to reduce the opportunities for fraud. There can be no doubt that with the move to online registration of titles and electronic transactions, new opportunities will arise for people both within and outside organisations to misrepresent themselves and to manipulate electronic transactions for financial gain.⁷³

Traditionally, two main safeguards have operated in relation to maintaining the integrity of the Torrens system: the requirement to produce a certificate of title for each dealing and the examination of instruments by the titles office.⁷⁴ However, the biggest change to the conveyancing practice under the new system has been the abolition of both of these safeguards. There is no longer a duplicate certificate of title, and conveyancers now have the ability to directly update the register without examination by the Registrar.

Commentators have always maintained that the existence of a paper certificate of title, which must be presented each time there is a transaction relating to the land, is the greatest safeguard against fraud. However, it must be noted that although the certificate of title provides some security in terms

⁷⁰ See R Thomas, 'Fraud, Risk and the Automated Register' in D Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) 349.

⁷¹ Christensen, above n 3, 7.

⁷² Ibid.

⁷³ Low, above n 2, 34.

⁷⁴ C Hammond, 'The Abolition of the Duplicate Certificate of Title and its Potential Effect on Fraudulent Claims over Torrens Land' (1999) 8 *Australian Property Law Journal* 23.

of the identity and the capacity of the party to deal with the land, failure to undertake additional checks of the person's identity and capacity *have* in the past led to fraudulent dealings with land.

⁷⁵Hammond, in a fascinating article,⁷⁶ points out that the overwhelming majority of registered fraudulent dealings over Torrens land are committed by people acquainted with the registered proprietor and with access to the duplicate certificate of title - examples of such individuals being family members or trusted agents such as solicitors and mortgage brokers.⁷⁷ When one looks at New Zealand's most infamous case, *Frazer v Walker*,⁷⁸ one can see that type of situation. Furthermore, she argues that while fraud by a trusted agent is not limited by the production of the certificate of title, the statistics show that it does operate as an effective safeguard against third party fraud.⁷⁹ As a result, she argues that in jurisdictions where legislative amendments have been based on the assumption that the abolition of the duplicate certificate of title is necessary for the introduction of an electronic lodgement system, it is arguable that it is easier for third parties to commit fraud over land where no duplicate certificate of title has been issued. As a consequence, she maintains that land fraud may no longer be limited to those with access to duplicate certificates of title.⁸⁰ Conversely, it must be noted that at least theoretically the abolition of the duplicate certificate of title makes it correspondingly harder for those trusted agents to commit fraud. Hammond notes that since duplicate certificates of title were made optional in Queensland, there has been only one successful claim for fraud against the State and that the circumstances of that case are such that the fraud would have been likely to occur had the duplicate certificate of title been issued.⁸¹

⁷⁵ Christensen, above n 3, 14.

⁷⁶ Hammond, above n 74, 23.

⁷⁷ Ibid.

⁷⁸ [1967] 1 All ER 649 (PC).

⁷⁹ Hammond, above n 74, 23.

⁸⁰ Ibid.

⁸¹ Ibid.

Thomas notes that the primary safety check in the whole system is now the conveyancer.⁸² He gives a number of scenarios whereby fraud could easily be perpetrated against the system. These include using a false driver licence, pretending to be someone else (but sharing the same name), a wife purporting to represent her husband, a secretary inappropriately using the conveyancer's electronic signature, or even wilful-blindness on the part of the practitioner. These examples show that fraud is possible. There can be no doubt that someone will attempt it. Indeed, as a number of Auckland solicitors recently learned to their detriment, it is happening already. The *New Zealand Herald* has reported that at least three lawyers have, apparently unwittingly, helped a 'mystery woman' to obtain \$540,000 by way of mortgage fraud.⁸³ The offender had assumed the name and identity of several different registered proprietors and tricked the lawyers into believing her false identity each time. One of the lawyers involved is now of the opinion that it is almost impossible to catch identity fraudsters. In this particular case there was nothing unusual about the woman and she produced extensive identity proof, including a New Zealand passport, Westpac credit card, ASB bank accounts, Inland Revenue Department taxpayer number and the house title. It is unclear what role the house title played in the fraud given the author's belief that New Zealand has now abolished the duplicate certificate of title. However, the author is relying on a newspaper report. It is reported that all the forms of identity turned out to be counterfeit. As an aside, the properties in question have now had caveats lodged against them and the Registrar-General of Land has indicated that the victims will have to go through a legal process to have the special orders removed or to sell their properties.⁸⁴ What is unclear from the reports is who is going to pay for such a 'legal process'? Without more information, it is dangerous to speculate but one assumes it is likely to be the victims.

⁸² Thomas, above n 70, 357.

⁸³ A Gibson, 'Con-woman Strikes Three Times in Sophisticated Scam' *New Zealand Herald*, 5 January 2006.

⁸⁴ Brookers Ltd, 'Department Protects Homes from More Fraud' *Brookers Legal News* (e-mail newsletter, 17 January 2006).

One of the most concerning things for the conveyancer involved in the fraud was the lack of assistance from Internal Affairs in checking the validity of the woman's passport. This concern brings us to a small but interesting point. There is in New Zealand, rightly or wrongly, no national identity card. However, many businesses and institutions use a driver licence or passport as proof of identity. However, it is not the role of the institutions that issue these documents to provide national identity services. These concerns were foreshadowed by the Privacy Commissioner in a Report to the Minister of Justice regarding the introduction of photographic driver licences. He stated:

The principal purpose of the Land Transport Safety Authority at present... is to undertake activities that promote safety and land transport at a reasonable cost. Despite this, the Bill proposes conferring upon the LTSA a function which has nothing to do with this objective; to produce a 'proof of identity card' for non-drivers who wish to purchase the card. The Bill will turn the LTSA into a purveyor of identity cards. This aspect has the potential to create the driver licence as a de facto national ID card in all but name ... I find it peculiar to see this function tacked onto the Authority. Surely the need for a state authority to enter the business of producing proof of identity cards is a matter for debate and study? Might Documents of National Identity be more suitable? Need it be done on a nationwide basis?⁸⁵

It seems clear that driver licences, and to an extent passports, *have* become 'de-facto' identity cards in all but name. It is concerning that the forms of identification which are relied on by conveyancers are issued by institutions that are not charged with such a responsibility. One can easily imagine a scenario whereby a conveyancer relies upon a driver licence that has been obtained fraudulently and, albeit unwittingly, aids a fraudulent property transaction. Can the defrauded party pursue the Land

⁸⁵ B H Slane, *Land Transport Bill: Photo ID Driver Licences: Report by the Privacy Commissioner to the Minister of Justice in relation to clause 28, and related clauses, of the Land Transport Bill concerning the creation, and mandatory carriage, of photo driver licences* (1998) <http://www.privacy.org.nz/people/ltilrep.html> at 26 January 2006.

Transport Safety Authority for failing to check the identification of the person to whom the licence was issued? This is unlikely, as the LTSA has not been given the statutory authority to assume that duty of care. In any event, it may be easier to sue the practitioner, notwithstanding that he or she may have acted reasonably in checking the driver licence. It should not be forgotten that the conveyancer has certified that the identity of the person in question is correct.

As discussed above, in all jurisdictions with electronic conveyancing there are now very strict attestation requirements required of the conveyancer. The manner of bearing witness to land transactions has evolved through the ages - from the symbolism of seisin, with its clods of earth and beating the bounds, to the modern day pen and ink signature of transacting parties and attesting witnesses. No matter what method of validation has been used, the objectives have remained the same: to identify the parties to a transaction; confirm their consent and intentions; and, accurately describe the land being transferred. However, there is no place in an electronic system for pen and ink signatures.⁸⁶ Because of this, it falls to the conveyancer to certify not only that the documents about to be submitted for registration are accurate, but also that the parties are who they say they are. The primary method of certifying these facts in each jurisdiction is known as the digital signature. With digital signatures there is no need for symbolism, witnesses or seals. Digital signatures, in effect, lock together the substance and content of a document with the signature of an identified executing party.⁸⁷ In order to fully understand the implications of certification, it is necessary to digress for a moment and examine more closely how electronic conveyancing documents are signed and why.

Four of the jurisdictions examined above, Ontario, British Columbia, Queensland and New Zealand (with England and Wales undecided), use a process known as public key encryption administered under a public key infrastructure (PKI) system as the method for signing documents electronically. Public key encryption is an encryption technique using two sets of

⁸⁶ J Barry, 'Electronic Cheques and Balances – Paper Gone to Bytes' (2004) 7 *Internet Law Bulletin* 126.

⁸⁷ *Ibid.*

mathematically related keys: the public key and the private key.⁸⁸ Both keys are mathematically related to each other. However, it is impossible to deduce the private key from the public key because both keys consist of very large prime numbers.⁸⁹ The public key can be made available to the world at large while the private key must be kept private. To encrypt a message, the sender uses his or her private key to encrypt the message (first encryption). The intended recipient would then use the sender's public key to decrypt the message. However, since the public key is made available to everyone, to ensure confidentiality and that only the intended recipient can decrypt the message, the sender would add a second layer of encryption using the recipient's public key (second encryption).⁹⁰ Thus to decrypt the message, the recipient must first use his or her private key to decrypt the second encryption, then use the sender's public key to decrypt the first encryption. In this way, public key cryptography can be used to provide proof of the integrity and authenticity of the message (ie it has not been tampered with).⁹¹

However, as mentioned above, just as the potential for fraud exists in a paper system, it will still exist in an electronic system. Just as a rogue may presently steal a proprietor's identity, so may an electronic identity be stolen.⁹² The digital signature identifies the sender as the person who sent the document, but, and this is a major difficulty, it does not prove the sender's identity.⁹³ When a person receives a digitally signed message from a sender, how would that person know that the public key of the sender contained in the digitally signed message is really the sender's public key? An impostor (X) could have generated a public/private key pair, signed the message, stating that it is from A. The recipient of the digitally signed message, if he or she believes X, would then assume that the message came from A. The recipient would use X's public key in the message to decrypt the digital signature,

⁸⁸ DA Whitman, 'Digital Recording of Real Estate Conveyances' (1998) 32 *John Marshall Law Review* 246.

⁸⁹ Low, above n 2, 38.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Cocks & Barry, above n 55, 20.

⁹³ Ibid.

thinking that it is A's public key.⁹⁴ This dilemma is solved by the utilisation of a system known as public key infrastructure (PKI).⁹⁵ PKI seeks to ensure that the system for distribution of the keys is made reliable. PKI systems around the world generally utilise the services of a trusted third party to perform this function.⁹⁶ The trusted third party is generally called a certification authority (CA). The CA's main function is verifying the relationship between the identity of the sender and the public key of the sender through the issuance of certificates. This certifies that the public key is indeed the valid public key for that sender. The recipient on receiving the encrypted message will receive the sender's public key and also a certificate from the CA certifying that the public key is correct and valid.⁹⁷

In New Zealand, the eDealing model uses a form of PKI infrastructure with LINZ as the registration authority and a third party vendor called beTRUSTed as the certification authority.⁹⁸ The certification authority provides the PKI infrastructure service responsible for generating digital certificates. To certify and sign an instrument, the solicitor must use his or her digital certificate (signature).⁹⁹

It is interesting to note that England and Wales have yet to decide on the exact technological framework for the use of electronic signatures, although it appears that the Land Registry envisage that the electronic signature will be based on some form of PKI. However, the general feeling so far is that the technology has not yet been proved and needs to be developed further. As expressed by the Law Society of England and Wales:

The insecurities of the Internet have become widely acknowledged, and PKI has been much promoted as the key enabling technology to allow electronic commerce to proceed safely ... the Law Society believes that great caution is needed before a process as sensitive as e-

⁹⁴ Low, above n 2, 38.

⁹⁵ Whitman, above n 88, 246.

⁹⁶ Low, above n 2, 39.

⁹⁷ Ibid.

⁹⁸ Ibid 44.

⁹⁹ Ibid.

conveyancing can wisely be launched on the basis of a business model of PKI that remains largely untried on any comparable scale.¹⁰⁰

In passing, one wonders why Land Information New Zealand felt so confident in the new system. While it would appear that this is a very secure system, it is clear that, as with all systems, it is not immune from attacks.¹⁰¹ Public key systems require that cryptographic key pairs be issued to individuals who are able to establish their identity to an appropriate degree of assurance. However, it is quite possible for fraudsters to produce false documentation to circumvent the system. They may assume a false identity. They may steal a driver licence. Indeed, the driver licence, passport, Inland Revenue number and birth certificate may all be stolen from the same drawer of a victim's home. However, it must be noted that in New Zealand only the conveyancer can get a digital certificate. Given most conveyancers are also lawyers, committing fraud is much more difficult. Proving that you are a lawyer limits the pool of potential victims of identity fraud and makes it much more difficult to do so successfully; but conveyancers themselves can always be fooled. Other issues to consider in a PKI environment include the manner in which cryptographic keys are kept and the security of the private key. For example, where private keys are stored on the individual's computer, his or her security may be compromised if there are inadequate access mechanisms such as poor use of personal identification numbers (PINS) or passwords. Fraud can still be perpetrated if another person obtains the private key and/or password;¹⁰² for example, a rogue secretary who knows where the digital certificate is kept. It must also be pointed out that there is nothing to stop the conveyancer him or herself from committing fraud although LINZ, in response to this criticism, points out that audits will happen yearly and on an ad hoc basis and

¹⁰⁰ Land Registry (England and Wales), *'E-Conveyancing: A Land Registry Consultation Report'* (2003) <http://www.landregistry.gov.uk/assets/library/documents/eccir.pdf> at 13 January 2006.

¹⁰¹ Low, above n 2, 50.

¹⁰² Ibid.

that this will hopefully catch such nefarious action.¹⁰³ Still, it is submitted that the crafty solicitor could be on the beach in Majorca before anyone knew what had happened. New Zealand and Ontario have sought to address these security concerns by creating obligations for users of each system and by adding new rules to their Rules of Professional Conduct specifying the manner in which the key pairs should be used and stored.¹⁰⁴ In New Zealand, under the Landonline Digital Certificate user obligations, the subscriber must protect his or her private key from any compromise and take all necessary precautions to prevent the loss of the key pair, or, modification, disclosure or unauthorised use of the private key. The subscriber must inform LINZ immediately if he or she suspects, or knows of, loss, disclosure or other compromise of his or her private key.¹⁰⁵

Furthermore, under Rule 3.04 of the *New Zealand Rules of Professional Conduct for Barristers and Solicitors*,¹⁰⁶ a lawyer must ensure that the password for his or her digital certificate is not disclosed to anyone. It must not be written down and must not be shared with anyone, including partners in a firm. The lawyer is also personally responsible for all instruments registered that have been certified and signed using that lawyer's digital certificate.¹⁰⁷ It is important to note, as discussed below, that this will have a profound effect on the compensation provisions of the *Land Transfer Act 1952*.

In light of these rules and the general nature of signatures in an electronic environment, we can now return to the discussion of the requirement of certification mentioned above. Certifications are an essential part of the electronic lodgement landscape in all jurisdictions. The nature of

¹⁰³ Bennion et al, above n 11, 207.

¹⁰⁴ Low, above n 2, 52.

¹⁰⁵ Ibid.

¹⁰⁶ New Zealand Law Society, *Rules of Professional Conduct for Barristers and Solicitors* (7th ed, 2006) <http://www.lawyers.org.nz/about/profcon.htm> at 12 December 2006. *Rule 3.04: 'A practitioner must not allow use of his or her Digital Certificate (DC) or the associated password by any other person.* Commentary: (1) A Digital Certificate (DC) with certifying and signing privileges issued to a practitioner for the purpose of an eDealing in Landonline is the electronic equivalent of a practitioner's personal signature. Use of the DC for certifying and signing allows direct transfer of property rights. Every practitioner accepts full responsibility for the consequences of the use of his or her Digital Certificates. (2) The DC must be used only by the practitioner personally.'

¹⁰⁷ Low, above n 2, 53.

certification in each jurisdiction differs slightly but generally certifications are given by lawyers or conveyancers and certify that the practitioner has been given authority by the client to act, that the identity of the client is correct, and that the client has capacity to act in the transaction.¹⁰⁸ It has always been the practice for lawyers in New Zealand to provide certifications verifying that the documentation being submitted is in order to permit the staff at LINZ to update the Register on the basis of the information contained within it. Matters certified included the correctness of the documentation, the identity of the parties, the execution of the documents, and all matters leading to a change in the status of ownership or interest in the land in question. The difference between paper based transactions and transactions under eDealing is that staff at LINZ manually check all documents lodged before the Register is updated under the paper based system. With eDealing, the certification and signing of an instrument leads to an automatic and instantaneous update of the Register when the document is submitted, thus placing a high level of responsibility on lawyers to ensure that the certificates are correct for the purposes of registration. It should be noted that failure to provide correct certification does not affect the validity of the registration. Once the certifications are provided and the instrument lodged and registered, indefeasibility of title vests in the registered proprietor, regardless of the correctness of the certifications. Thus if conveyancers are not vigilant in providing correct certifications or in ensuring that the information contained in the electronic instrument is correct before it is lodged and then automatically registered, mistakes in the register could occur.¹⁰⁹ The effect of this is of profound importance for conveyancers because when it comes to the question of security, all fingers appear to be pointing at the practitioner. As mentioned above, Rule 3.04 of the *New Zealand Rules of Professional Conduct for Barristers and Solicitors* makes a lawyer personally responsible for all registered instruments that have been certified and signed using that lawyer's digital

¹⁰⁸ Christensen, above n 3, 13.

¹⁰⁹ Low, above n 2, 62.

certificate.¹¹⁰ If the practitioner gets it wrong at the outset, it is clear that he or she will bear responsibility for consequential problems.¹¹¹ It is of critical importance to note that in Ontario, British Columbia, and Queensland, the electronic system is limited to the electronic submission of documents and does not encompass electronic registration or the making of any entry in the register by a user external to the Land Title office. Manual intervention in the form of the Land Titles office staff examining and processing the electronic document is still required. In Ontario, staff at the Land Titles office must certify the document before it is officially 'registered' and if the document is a transfer or other change of ownership document, the Land Titles office staff must update the ownership field of the register.¹¹² This is in contrast to the position in New Zealand where, upon lodgement of the electronic dealing, Landonline runs automated checks. If the dealing passes, it is registered immediately and the title register is automatically updated without manual intervention by LINZ.¹¹³ Rule 3.03 of the *Rules of Professional Conduct for Barristers and Solicitors* reinforces a practitioner's obligation to take reasonable steps to ensure that any certificate given under s 164A of the *Land Transfer Act 1952* (see above) is correct and complies with the statutory requirements. The New Zealand Law Society guidelines for eDealings provide an indication of the rationales for requiring certifications.¹¹⁴ Guideline J provides:

It is therefore imperative for the protection of both the lawyer and the integrity of the Register to be absolutely satisfied as to the identify and bona fides of the client on whose behalf the certifications are being made. There is no independent checking carried out by LINZ prior to registration and the lawyer's actions directly affect the register.¹¹⁵

¹¹⁰ Ibid 53.

¹¹¹ D Brown, 'Electronic Conveyancing: Beware and Prepare' (2003) 153 *New Law Journal* 626.

¹¹² Low, above n 2, 60.

¹¹³ Ibid.

¹¹⁴ Christensen, above n 3, 13.

¹¹⁵ Ibid.

The Canadian position provides a further contrast to the New Zealand position. In Ontario, the Teranet system requires a user to provide a certification of completeness. This indicates that the information is complete and that the lawyer has obtained an Acknowledgement and Direction from his or her client (which is optional). This contains authorisation by the client to conduct the transaction electronically plus confirmation that the electronic documents were explained to the client. A client agrees to be bound as if he or she had signed the documents. A client also agrees that he or she has not misrepresented his or her identity to the lawyer. As such, the certification of completeness is only confirmation that the lawyer has authority and a signed copy of the Acknowledgement and Direction. There is no certification by the lawyer that the identity of the client has been confirmed.¹¹⁶ In British Columbia, a lawyer certifies the following each time an electronic signature is incorporated into an electronic form: that a true copy of the electronic instrument has been executed and witnessed by the appropriate parties in accordance with Part 5 of the *Land Title Act [RSBC 1996]* and that the true copy is in the possession of the person who incorporated his or her electronic signature. Again it is notable that lawyers in British Columbia are only certifying that certain documents are in their possession and are not certifying the identify of the client.

In New Zealand, the suggested rationale for requiring certification from a lawyer is the maintenance of the integrity of the register due to the removal of independent checking by the registry.¹¹⁷ This has shifted responsibility to the conveyancer, not only for ascertaining the identity of the client but also for the accuracy of information being submitted. Lodgement leads to automatic registration without manual intervention, therefore conveyancers have the added responsibility of providing specified certifications to electronic instruments before the

¹¹⁶ Ibid.

¹¹⁷ Ibid 14.

instruments can be lodged for registration.¹¹⁸ However, there are certain in-built features within the New Zealand Landonline system designed to minimise errors from occurring:

1. The pre-validation feature: Once prepared, an eDealing can be pre-validated, that is, checked to ensure that the dealing will pass registration if submitted in its present state.
2. The templates used to create an eDealing have certain pre-defined fields such as the owners name and address. These details are inserted onto the eDealing automatically by the system, using the information available from the electronic database maintained by LINZ.
3. On lodgement, the Landonline system itself runs automated checks and if the eDealing contains any errors, the eDealing is sent back to the workspace so that it can be modified and re-submitted.¹¹⁹

However, it must be noted that these 'fail-safes' are premised on two factors: the computer getting it right and the lawyer not being negligent. Furthermore, pre-validation is only going to pick up things that would have been picked up later in any case. It is a time saving mechanism rather than an actual protection against incorrect information getting on the register. The effect of the New Zealand system is to make the conveyancer the 'middle-man'. The conveyancer certifies and signs *on behalf of the* client. If anything goes wrong, the conveyancer is potentially liable. It is not clear that there is a direct contractual relationship between Land Information New Zealand and the client. This is in contrast to the position when one uses an electronic banking system. If a person chooses to use the Bank of New Zealand's Internet Banking service, liability (if one has not acted fraudulently or

¹¹⁸ Low, above n 2, 61.

¹¹⁹ Ibid 64.

negligently and has not contributed to, or caused, losses from unauthorised use) is limited to the lesser of:

- \$50;
- The balance of your account(s), including any pre-arranged credit; or
- The actual loss at the time you notify us.

If one wanted to dispute this, the argument would be contractual and between two parties: the user and the BNZ. Under Landonline, the argument would be between three parties of uncertain contractual relations. If the conveyancer is acting as agent for the client, is the conveyancer liable? If the conveyancer is not liable, is there any contractual relationship between the client and LINZ? Who is it that has made the mistake? Is that person liable? These are important questions to which there are currently no answers. The system as it stands is unclear and uncertain. In passing, it is submitted that the solution to this is to enable vendors and purchasers to access some sort of PIN type arrangement that would enable them to initiate dealings in their names and at their behest, with the conveyancer acting as a facilitator rather than as the primary certifying perpetrator. For example, in Victoria some are advocating the introduction of a 'Landcard'. This will operate much like a credit card and will enable parties to sign electronic documents. It is envisaged that in order for a seller to enter the system and list a property for sale with an agent, the seller will first need to obtain a Landcard so that the *seller* can electronically execute all documents necessary for the transaction.¹²⁰ Such a system would make it clear that it is the vendor who is actually transferring the property and would clarify the position of each of the parties in the transaction. A system like this should eliminate the risk of the conveyancer being caught between the client and LINZ.

¹²⁰ Cocks & Barry, above n 55, 12.

As it currently stands, conveyancers have assumed a number of new risks. The effect these risks will have on the practice of conveyancing remains to be seen but they have the potential to be profound. In addition to the concerns already raised, concerns must be noted regarding the potential changes to the exercise of the compensation provisions of the *Land Transfer Act 1952*.

V. Consequences for Compensation

At the moment all Landonline caters for is routine transactions (simple transfers, mortgages and discharges) and it must be said that the risk can perhaps be overstated. However, LINZ is anticipating that the eDealing system will eventually allow lodgement of virtually every type of transaction to be completed electronically.¹²¹ This raises the question of what happens in the event that the conveyancer gets it wrong, either in terms of certifying that someone is somebody that they are not, or, entering information on to the register that is incorrect. For example, while it is unclear how this would be achieved, one assumes that conveyancers and developers will eventually be able to subdivide a head-title entirely online. This raises questions as to what would happen if something went wrong. What would be the effect of an easement that was misdescribed? What would be the effect of a covenant that was badly drafted? What would happen if a lawyer, when drafting an easement, did not correlate the dominant and servient tenements correctly? What if an easement was simply not registered? These types of cases are not uncommon. For example, in *Millns v Borck*¹²² three flats had a common driveway but on one lot a right of way was omitted so that one flat was left with no access. The case of *Sutton v O'Kane*¹²³ provides another example. These are important questions and it is submitted that the answers are somewhat disquieting. The defining feature of the Torrens system is an assurance fund to guarantee title against loss. As Toomey states:

¹²¹ Bennion et al, above n 11, 208.

¹²² [1986] 1 NZLR 302.

¹²³ [1973] 2 NZLR 303.

The principles of 'indefeasibility' and 'guarantee' are complementary: the former gives security against deprivation; the latter assumes the possibility of such deprivation and grants financial assistance if it occurs.¹²⁴

The core compensation provision of the *Land Transfer Act 1952* is s 172. It provides two separate grounds under which a person may bring an action against the Crown for recovery of damages.¹²⁵

Under s 172(a), a person may bring such an action if he or she:

Sustains loss or damage through any omission, mistake or misfeasance in the performance of any duty, function or power imposed or conferred on the Registrar or an employee of the Chief Executive of the Department or person to whom delegation has been made under s 5 of the Act.

Under s 172(b), a person can bring such an action if he or she has:

Been deprived of any land, or of any estate or interest in land, through the bringing of land under the Land Transfer Acts; or by the registration of any other person as proprietor of that land; or by any error, omission or misdescription in any ... [computer register]; or in any entry or memorial in the register; or has sustained any loss or damage by the wrongful inclusion of land in any ... [computer register] ... and who, by this Act is barred from bringing an action for possession or other action for the recovery of that land, estate or interest.

The leading case on s 172(a) is *Registrar-General of Land v Marshall*.¹²⁶ While space prohibits an in depth analysis of this case, an important point needs to be made. Hammond J stated that regard must be given to the precise words of the statute. These can be broken down into the following:

(i) That a person

¹²⁴ Bennion et al, above n 11, 135.

¹²⁵ Ibid 137.

¹²⁶ [1995] 2 NZLR 189.

- (ii) Has sustained loss or damage
- (iii) Through
- (iv) Any omission, mistake or misfeasance
- (v) Of specified officers
- (vi) In the execution of their duties.¹²⁷

It is the phrase 'of specified officers' that is the crux of the discussion that follows. These words refer to the Registrar or an employee of the Chief Executive of the Department or a person to whom a delegation has been made under s 5. Obviously, a conveyancer would need to fit under the last heading. This part was added by s 65(1) of the *Land Transfer (Computer Registers and Electronic Lodgement) Amendment Act 2002*. However, it does *not* include a conveyancer certifying under s 164A of the *Land Transfer Act*. Therefore a mistake made by a conveyancer in certifying the instrument itself, or in the collection of any of the supporting evidence, is not a mistake of the Registrar and therefore not a mistake for which compensation is payable under s 172(a).¹²⁸ The really crucial point though is that non-compliance with statutory provisions (or other legal requirements) will not stop registration being effected. It is the conveyancer who now vests the mantel of indefeasibility by his or her certification. Registration of a void instrument does not prevent the operation of state guarantee of title.¹²⁹ In other words, what you see on the title is what you get. If the mistake is that of the conveyancer, as it will invariably be, given that the Registrar and his or her staff have no part in updating the Register, the conveyancer will be the only party left to sue.

¹²⁷ Bennion et al, above n 11, 139.

¹²⁸ Ibid.

¹²⁹ Thomas, above n 70, 356.

Moreover, theoretically the only way to remove a mistake from the Register will be to rely on the powers of correction contained in ss 80, 81 and 85 of the *Land Transfer Act 1952*.¹³⁰ Under s 80, the Registrar has power to correct clerical or administrative errors. The operative provision is s 80(2), which enables the Registrar to cancel or correct any computer register and, if appropriate, create a new computer register in order to correct any error, or supply any omission, in any computer register.¹³¹ This section is uncontentious and an illustration of its use is found in *Millns v Borck*¹³² where (as mentioned above) the Registrar omitted to record a legally created right of way on the applicants' (then) certificate of title. It was held that the omission came within s 62(b) of the *Land Transfer Act* as an exception to indefeasibility, and that s 80 was the appropriate provision for the correction of the 'slip'.¹³³ However, this case would be immediately distinguishable under the automated register system, given that the Registrar would not have made the omission. Furthermore, s 81, under which the Registrar is given further and more extensive powers of correction, is riddled with uncertainty and may not provide a solution. Section 81(1) provides:

Where it appears to the satisfaction of the Registrar that any certificate of title or other instrument has been issued in error, or contains any misdescription of land or of boundaries, or that any entry or endorsement has been made in error, or that any grant, certificate, instrument, entry, or endorsement has been fraudulently or wrongfully obtained, or is fraudulently or wrongfully retained, he may require the person to whom that grant, certificate, or instrument has been so issued, or by whom it is retained, to deliver up the same for the purpose of being cancelled or corrected, as the case may require.

¹³⁰ D Grinlinton, 'The Registrar's Powers of Correction' in Grinlinton (ed), *Torrens in the Twenty-first Century* (2003) 217.

¹³¹ Bennion et al, above n 11, 127.

¹³² [1986] 1 NZLR 302.

¹³³ Bennion et al, above n 11, 127.

The circumstances relating to 'error', 'misdescription', and 'fraud', reflect statutory exceptions to indefeasibility found elsewhere in the legislation and are not inconsistent with the statutory scheme. Of more concern is the extent to which s 81(1) refers to grants, certificate, instruments, entries or endorsements 'wrongfully obtained ... or wrongfully retained', as the concept of wrongfulness is inherently ambiguous and nowhere defined or explained in the legislation.¹³⁴ Furthermore, s 81(1) appears to give the Registrar power to adjudicate on substantive issues and to implement findings without recourse to the courts.¹³⁵ It must be noted that it is possible that under this provision there will be no relief for an innocent person who has attained registration by 'wrongful' means.¹³⁶ However, as Grinlinton notes, it may be that the Registrar cannot act unless there is some legal wrong 'at law or equity' which must be established by due process of law. So an innocent person might be caught needing to prove a wrong to allow s 81 (1) to operate but being denied relief because of that very wrong. Section 85 allows the Court to direct the Registrar to cancel or correct any computer register or other instrument, or entry or memorial in the register or other instrument, or substitute the same as circumstances so require.¹³⁷ However, the power does not extend beyond those cases in which adverse claims against the registered proprietor are admitted by the Act.¹³⁸ In other words, the Court must be able to point to something in the Act which gives it authority. It is far from clear that a mistake by the conveyancer would be enough to trigger this provision and in any case the cost of going to the High Court for relief might be prohibitive. It is important to reiterate that the *Rules of Professional Responsibility* make the lawyer personally responsible for certification.

These powers of correction raise interesting questions. However, in addition to questions about whether, and how, these provisions will operate, some of the factual circumstances underlying the

¹³⁴ Grinlinton, above n 131, 217.

¹³⁵ Ibid.

¹³⁶ Bennion et al, above n 11, 145.

¹³⁷ Ibid 135.

¹³⁸ *Fraser v Walker* [1967] 1 AC 569.

case law in this area, in particular s 81, may have interesting new outcomes under an automated register. It is useful to canvas one of these as an example. Suppose a mortgage that required endorsement of the Maori Land Court before registration is registered by a conveyancer who overlooked this requirement, was negligent, or simply did not realise it was Maori Freehold Land. Bear in mind, the conveyancer registered the mortgage by directly updating the register, without any examination by the Land Transfer office. What would happen? It may sound far-fetched but the essence of this scenario occurred under the old system in *Housing Corporation v Maori Trustee*.¹³⁹ The Court held in that case that it was within the District Land Registrar's powers under s 81 to cancel the registration of the mortgage. However, the Court also said the power was anachronistic and use of it would undermine confidence in the system. It would seem that no thought has gone into what would happen now that the system has changed. Will it be that the Registrar begins to use this unexercised and unwanted¹⁴⁰ provision? If so, will the Registrar be willing to act on the instruction of the Maori Land Court? Or, will it be a decision that the Registrar will make on his or her own part? Or, will nothing happen? If nothing happens, how then will the problem be solved? Will the conveyancer be liable? These are important questions and it is disappointing and dangerous that there are no ready answers in the legislation or literature. Further, while s 172(b) will not cause the same types of problems as are likely to arise under s 172(a), given that fraud of the *Frazer v Walker* variety will still operate, it is interesting to note s 175. Section 175 covers recovery of compensation and costs paid in the case of fraud. In such a case, s 175(1A) provides:

Where any sum of money has been lawfully paid out of the Public Account as compensation for any loss or damage sustained in any case to which section 172A of this Act applies and that loss or damage was caused wholly or partly by the negligence of the

¹³⁹ [1988] 2 NZLR 662.

¹⁴⁰ *Housing Corporation v Maori Trustee* [1988] 2 NZLR 662, 701 (McGechan J).

purchaser's [[conveyancer]], the amount of that compensation (together with all costs incurred in testing or defending any claim or action in relation to that compensation), to the extent that it may properly be attributed to that [[conveyancer's]] negligence, shall be deemed a debt due to the Crown from that [[conveyancer]], and may be recovered from him.

Given the certification requirements outlined above, one suspects that this provision might enable the Crown to avoid any costs in underwriting the land registration system. Both of the compensation provisions will probably end up costing the Crown nothing. Under s 172(a), the Crown will not be liable, and under s 172(b), the Crown will be able to chase the costs from the conveyancer.

In summary, while Landonline does not affect the integrity of the Register, it has diluted the role of the Registrar. The duplicate certificate of title has been removed and the registration of an eDealing puts responsibility squarely on the shoulders of conveyancers.¹⁴¹ The conveyancer is the only arbitrator for accurate registration. New Zealand is the only jurisdiction that has even contemplated allowing the register to be automatically updated, let alone actually done it. Even in Victoria, which is contemplating a system very similar to that operating in New Zealand, once information reaches its ultimate stage at the register, the information will enter the register in data form and the register will, *only after examination*, be updated.¹⁴² The legislative changes in New Zealand have put the onus onto the conveyancer to ensure that the person executing the document is who they say they are and that the information in the documents is correct.

If the conveyancer makes a mistake in creating a document, the Registrar will be able to argue *non est factum* and escape liability. It is submitted this would be different if the Registrar was still charged with examining documents presented for registration. Furthermore, if a conveyancer acts fraudulently or negligently, to any degree, in certifying a document, the Registrar will be able to

¹⁴¹ S Jedynak, 'Refinancing Mortgages' [2003] *New Zealand Law Journal* 305.

¹⁴² Cocks & Barry, above n 55, 10.

pursue that conveyancer for damages pursuant to the Crown's right of subrogation under s 175(1A). Any damages awarded would offset either totally or partially any payment that is made by the Crown to the deprived party.¹⁴³ Section 175(1A) of the *Land Transfer Act* does not limit the compensation available, nor does it undermine the system, but it does give rise to a debt owed by the conveyancer which is measured by the extent of the conveyancer's negligence.¹⁴⁴ Moreover, it is unclear how any inaccuracies on the register could be rectified. Thomas argues that the advent of automated registration has made title less secure. This is because registration is now undertaken without an outstanding duplicate of title, and because the registry staff no longer check for flaws in the documentation. He states that we have moved from a system with safeguards to a system that relies on the integrity and competence of the users. Registration presents no obstacles to the dishonest, or incompetent, practitioner.¹⁴⁵ It is submitted that Thomas is right in part: the role of the registry staff in checking documentation was vital not only in limiting the number of mistakes which ended up on the register but also in providing the link in the chain that enabled the compensation provisions of the *Land Transfer Act 1952* to be guaranteed by the Crown and not the Solicitors' Indemnity Fund. However, it is also submitted that impersonation will be reduced by the electronic system. Previously the person who could secure the paper title had a reasonably good chance of impersonating the registered proprietor provided that that person was of the right sex and could keep a straight face.¹⁴⁶ Now the fact that it will be much more difficult for fraudsters to access the materials to commit fraud (such as the digital certificate) means that it is unlikely that the traditional forged signature on a document by a nefarious wife or husband (as in *Frazer v Walker*) will be able to happen; although the troubling developments in Auckland may prove the author wrong. It is important to note that any reduction in instances of fraud under the new system is likely to be as a

¹⁴³ Hammond, above n 74, 23.

¹⁴⁴ Jedynak, above n 142, 305.

¹⁴⁵ Thomas, above n 70, 349.

¹⁴⁶ Cocks & Barry, above n 55, 20.

result of the new onus placed on conveyancers. The risk they run by participating in the system has undoubtedly increased. Finally, the New Zealand system places greater responsibility on certifying parties in comparison to the position in Canada by requiring a positive statement about the identity of the client and the right of the client to deal with the property. The fact that there is no national body devoted to the issuance of identification, and that conveyancers are consequently relying upon systems designed to achieve different outcomes, only exacerbates these risks. While conveyancers are only required to undertake checks which were already mandated and prudent in the paper environment, one does wonder whether certifying the outcomes of those inquiries, as opposed to certifying that inquiries have been made, is necessary.¹⁴⁷

VI. The Consequences of a Technical Failure

The risk of fraud and mistake are a serious concern. However, there are other problems peculiar to electronic conveyancing that must be considered. Of these, the consequence of a technical failure is probably the most apparent. As with any computer system, there is always the risk that the Landonline system will fail. Indeed in October, November and December of 2005, Landonline was not available a number of times. At one point the system was down for nearly three days.¹⁴⁸ Quaintly referred to as 'difficulties',¹⁴⁹ anecdotal evidence suggests¹⁵⁰ that these outages had a huge effect on business. As one can imagine, the effect of a delay in settling on a multimillion-dollar property transfer can be very expensive. Landonline has stated that it was let down by infrastructure and what had effectively been 'bad luck'.¹⁵¹ It is not surprising that the system will have

¹⁴⁷ Christensen, above n 3, 15.

¹⁴⁸ Land Information New Zealand, 'Further Information on Landonline Difficulties' (2005) 18 *Landwrap* <http://www.landonline.govt.nz/content/newsletter.asp#18> at 12 January 2004.

¹⁴⁹ Ibid.

¹⁵⁰ Discussions with local practitioners.

¹⁵¹ S Cottrell, 'Message from Sharon Cottrell Regarding Landonline' (2005) 18 *Landwrap* <http://www.landonline.govt.nz/content/newsletter.asp#18> at 12 January 2004.

down periods. Computers are notorious for freezing, crashing or just not working properly at the exact moment that you need them. What is surprising is that there has been little, if any, discussion of what happens if the system goes down. While LINZ has a disaster management plan, this is aimed at getting the system up and working again. It does not focus on the consequences for the conveyancers who rely on the system. In the future, when eDealings have been made compulsory (which is almost certain to happen), what will happen when the system fails (which it almost certainly will)? Furthermore, there are other possible causes of interruption to the operation of Landonline including industrial action, failure of electricity supply or internet service, vandalism, fire, natural disaster, or even war and civil disturbance.¹⁵² In both the personal and commercial spheres, these risks need to be minimised and managed.¹⁵³ In Queensland, since the commencement of the automated titling system there have been several computer shutdowns due to failures within the system. Most have been of short duration, but one particular shutdown over a twenty-four hour period led to litigation between a vendor and purchaser.¹⁵⁴ In *Imperial Bros Pty Ltd v Ronim Pty Ltd*,¹⁵⁵ the Queensland Court of Appeal examined the legal problems associated with electronic conveyancing. Imperial Bros had agreed to sell to Ronim a building for the sum of \$3.625 million. Clause 25.1 of the contract of sale provided that '[c]ompletion shall be effected at such time and place as may be agreed upon by the parties. The time for completion shall be between the hours of 9am and 5pm on the Date for Completion.' Clause 26 provided that time was of the essence. The agreed date for completion was 13 October 1998. Settlement was to be at 3:30pm. At about 12:30pm on that day, the solicitors for the purchaser advised that they were not able to undertake a check of the title as the computer for the Land Title office was inoperative. A request was made for an extension to the next

¹⁵² S Christensen & A Stickley, 'Electronic Title in the New Millennium' (2000) 4 *Flinders Journal of Law Reform* 223.

¹⁵³ L Griggs, 'Possessory Titles in a System of Title by Registration' (1999) 21 *Adelaide Law Review* 170.

¹⁵⁴ Christensen & Stickley, above n 153, 223.

¹⁵⁵ (1999) Q ConvR 54-523.

day. This was denied by the vendor. However, it was agreed that settlement would be deferred until 5pm. Whilst travelling to the settlement, severe thunderstorms and traffic disruptions caused the solicitor of the purchaser to be delayed by some minutes and she arrived at the vendors' offices a short time after 5pm. The vendor refused to settle and rescinded the contract the next day.¹⁵⁶ The issue that was relevant for the present discussion can be stated as follows: 'Whether the absence of the ability to check the title, because of the absence of a certificate of title and the circumstances that the computer was down, excluded any consequent right by the vendor to rescind?'¹⁵⁷ The Court ultimately held that the obligation to complete the contract was suspended when, through no fault of the parties, the computer was inoperative. An implied term was to be inserted into the contract to give effect to this principle. The Court held that:

Where, through no fault of their own, on the day for completion, the parties cannot carry out the necessary computer checks through the Land Titles office ... because the ... computer is inoperative, the obligation to complete is suspended until that can be done.¹⁵⁸

In such a case, the purchaser need not settle and time ceases to be of the essence.¹⁵⁹ This implied term met the requirements for implying a term for business efficiency. It was reasonable and equitable, so obvious that it went without saying, was capable of clear expression, and was not contradictory of any express provision of the contract.¹⁶⁰ Although the contract of sale could operate without the implied term, it could not operate effectively.¹⁶¹

In New Zealand, the contractual terms of an agreement for sale and purchase are open to litigation. Despite a contract becoming unconditional, there are many games that can be played if a party wishes

¹⁵⁶ Griggs, above n 1, 6.

¹⁵⁷ W D Duncan & S A Christensen, 'Overcoming the Problems of Showing and Making Cyber Title' (1999) 8 *Australian Property Law Journal* 20.

¹⁵⁸ (1999) Q ConvR 54-523, [20].

¹⁵⁹ Ibid.

¹⁶⁰ Duncan & Christensen, above n 158, 20.

¹⁶¹ Christensen & Stickley, above n 153, 223.

to delay settlement.¹⁶² To illustrate the problems that might arise due to the failure of the Landonline system, it is interesting to look to three (although there are potentially more) areas of contract law.

To begin it is interesting to look at the consequences where, as in *Imperial Bros*, the contract states that time is of the essence. If New Zealand were to follow the Queensland Court of Appeal's lead in this regard, in such circumstances time being of the essence would be destroyed in respect of a particular contract. This means that a notice to complete, giving a reason, needs to be served by one party upon the other before time would again become essential. If a notice were not served in that way, the contract would remain on foot and neither party could insist upon completion of that contract at any particular time. It is clear from the judgements in *Imperial Bros* that a notice to complete, remaking time of the essence, in the circumstances of a computer breakdown of Landonline, could only be served at a time after the breakdown had been remedied and Landonline was fully functional.¹⁶³ It is submitted that this could cause a number of serious problems. If one party wants to prevaricate, he or she may dispute when Landonline had again become fully functional. Thus, there could be an expensive argument as to when the notice to complete should have been, or was able to be, delivered.¹⁶⁴

Perhaps the most obvious ploy for a litigant would be to argue breach of contract. At settlement, the purchaser is obliged to tender performance and failure to do so will enable the vendor to terminate the contract. If a purchaser fails to tender performance at settlement, this will constitute a breach of an essential term of the contract giving the vendor the right to terminate and sue for damages.¹⁶⁵ Or conversely, it would enable the vendor to enter into a new contract with a third party.

¹⁶² L Dempster, 'Conveyancing and the Torrens System' [1996] *New Zealand Law Journal* 343.

¹⁶³ Duncan & Christensen, above n 158, 20.

¹⁶⁴ Ibid.

¹⁶⁵ Christensen & Stickley, above n 153, 223.

Again this could have profound consequences, especially in the commercial market where prices can fluctuate dramatically.

A final example is the doctrine of frustration. While unlikely that this head would be successful, it is at least plausible, and could involve a protracted legal argument. Under the general law, a contract is frustrated when:

Without default of either party a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract.¹⁶⁶

The doctrine will in theory apply to contracts relating to land. However, the circumstances would be limited. The essence of a contract for the sale of land is the transfer of title from the vendor to purchaser. Therefore, a contract for the sale of land will be frustrated if the vendor is unable to do this at the nominated time.¹⁶⁷ Mere delay, inconvenience or hardship, are not sufficient to frustrate a contract.¹⁶⁸ If the transfer of the vendor's interest in the land can still be carried out, mere delay on the date for settlement will not frustrate the contract. Furthermore, it is likely that in any event the ambit of the *Contractual Remedies Act 1979* could cover the rare circumstances in which frustration is likely to occur at common law.¹⁶⁹ If the computer system is unavailable on the date for settlement, it merely delays the ability of the parties to carry out the settlement. This would not come within the ambit of the doctrine of frustration. Consequently, neither party would be in a position to terminate.¹⁷⁰

It is submitted that a party should not be entitled to rely on a temporary failure to repudiate a contract for the sale of land. It seems clear that any shutdown of the electronic registry would have profound effects not only for the parties involved in the transaction but also on the conveyancers acting for

¹⁶⁶ *Davis Contractors Ltd v Farnham UDC* [1956] AC 696, 729 (Lord Radcliffe).

¹⁶⁷ Christensen & Stickley, above n 153, 226.

¹⁶⁸ *FA Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397.

¹⁶⁹ Bennion et al, above n 11, 576.

¹⁷⁰ Christensen & Stickley, above n 153, 226.

them. However, guidance can be taken from the one jurisdiction that has examined this issue and taken steps to minimise the legal consequences of a shutdown. As mentioned above, for some time, the land title system in the Canadian Province of British Columbia has been electronic. There have been similar problems experienced with conveyancing in this digital environment.¹⁷¹ In March 1996, the Law Reform Commission of British Columbia delivered a minor report entitled, *The Legal Consequences of a Temporary Land Title Office Shutdown*.¹⁷² The report has its origins in comments made in a judgement of the Court of Appeal of British Columbia in the case of *Norfolk v Aikins*¹⁷³ where problems for a purchaser who did not complete a contract on time were exacerbated by the failure of the computer system operated by the Land Titles office in Vancouver. In British Columbia, transfer documents, lease mortgages and mortgages given by purchasers to finance the purchase, are lodged in the Land Titles office and registered while the settlement funds are held in escrow.¹⁷⁴ Once registered, the funds are released to the vendor or the vendor's mortgagee, as the case may be, in order that clear title might be taken by the purchaser and the purchaser's mortgagee. The workings of the Land Titles office are therefore integral to the completion of the process. If there is a computer failure for one reason or another at that juncture, the entire transaction is halted at its most critical stage and cannot be completed until the computers are again operational.¹⁷⁵ The Law Reform Commission of British Columbia considered how to address problems which might result from the prolonged absence of Land Titles office services due to many reasons including not only computer down time but also industrial activity and natural disasters, such as fire or earthquake, which might make those services inaccessible for a period. Other

¹⁷¹ Duncan & Christensen, above 158, 21.

¹⁷² Law Reform Commission of British Columbia, *The Legal Consequences of a Temporary Land Title Office Shutdown: A Draft Report for Consultation* (1996) <http://www.bcli.org/pages/publications/lrcreports/consultation/cp73home.htm> at 18 November 2005.

¹⁷³ [1990] 2WWR401.

¹⁷⁴ Duncan & Christensen, above 158, 22.

¹⁷⁵ Ibid.

given potential causes of interruption were criminal activity, such as vandalism, or inaccessibility due to civil disturbance, or in extreme cases, a state of war.¹⁷⁶ The Commission observed that land contracts did not generally contain *force majeure* clauses which would have identified instances beyond the control of the parties disabling them from carrying out their part of the bargain and providing parties with an agreed course of action, such as deferral of completion, to meet an unexpected contingency. The Commission considered the very limited application of the doctrine of frustration to sales of land and concluded, correctly, that this principle would rarely, if ever, apply and the computer breakdown in the Land Titles office might not always, in any event, be sufficient to warrant the application of the doctrine.¹⁷⁷

The Commission took the view that any remedy, whether it was contractual or statutory, had to address the possibility of more than short, episodic computer breakdowns and should also provide a satisfactory solution where there were more lengthy interruptions to Land Titles office operations. As a guiding principle, the Commission acknowledged that temporary conditions prevailing in the Land Titles office should not become a means of easy exit from contractual obligations freely entered into by a vendor and purchaser.¹⁷⁸ In summary, the Commission recommended the introduction of a new statutory provision which would cover all transactions:

1. If time specified in an enactment for applying for registration or depositing, lodging or filing of an instrument within the meaning of the Land Title Act expired while the operations of the Land Titles Office has ceased or that Office was unable to accept applications for registration or provide access to computerised title information, the time specified would be extended to the end of the public business hours on the next day throughout which those services are continuously available.

¹⁷⁶ Ibid 23.

¹⁷⁷ Ibid 24.

¹⁷⁸ Ibid 23.

2. This extension of time should also apply to time limits specified in contracts for the sale and purchase of land, as appropriate, unless the parties otherwise agreed and, to that end, the Commission suggested the statutory implication of a term in every contract for purchase and sale of land. The implied term would be to the effect that, if on the date specified for completion, the operation of the Land Titles offices are interrupted so as to prevent the receipt of applications to register instruments needed to complete the contract or the performance of any necessary or customary searches incidental to its completion and the purchaser is ready willing and able to complete, the purchaser may waive the terms of the contract not for the benefit of the vendor and require the vendor to fulfil its obligations owed to the purchaser under the contract.
3. The extension of time should not apply if the period in which the Land Titles office is not operational commences during the day on which the time specified in the enactment expires and ends on the same day more than two hours before the time at which that office normally closes to the public. In other words the provision should not apply to minor interruption to services.¹⁷⁹

It is clear that the Commission favoured a statutory solution over amendment to the standard contractual instrument or some other ad hoc solution which effectively left the parties to their own devices which, it was conceded, may have ultimately led to further litigation.¹⁸⁰ LINZ does give guidance on what to do if you cannot access Landonline on settlement day.¹⁸¹ Suggested steps include obtaining guaranteed searches prior to settlement day, certifying and signing the eDealing prior to settlement day, and settling without Landonline. However, it is submitted, with respect, that these do

¹⁷⁹ See Law Reform Commission of British Columbia, above n 173.

¹⁸⁰ Duncan & Christensen, above n 158, 26.

¹⁸¹ Land Information New Zealand, *Can't Access Landonline of Settlement Day* (2006) <http://www.landonline.govt.nz/content/registeredusers/access-lol-settlement-day.asp> at January 15 2006.

not take into account the contractual matrix involved in buying and selling a property. If a contract states that registration or settlement will occur on a particular date and time and this does not happen, this will cause major problems. Furthermore, the only way to settle without Landonline is for the conveyancer to give an undertaking. However, this opens the practitioner up to a larger degree of risk and it seems likely that practitioners, at the very least, will be wary about giving such undertakings. It must be noted that, as with the compensation provisions outlined above, there is a real risk that if the computer system is down, the practitioner may be exposed to negligence or contractual claims.¹⁸² Claims against the practitioner would be compounded in circumstances where the practitioner has had the choice to use the Landonline system.

In summation, the new form of registration is fraught with unresolved issues and problems. The decision in *Imperial Bros* shows us that electronic conveyancing will open new challenges for the law, and that the law can respond. Moreover, whilst that response may be common law or legislative, the opportunities and threats of technology cannot simply be ignored.¹⁸³ It is submitted that the solution lies not in any amendment to the Standard Agreement for Sale and Purchase, or a common law implied term, but in a legislative response. Furthermore, this response should take the lines of that suggested by the Law Reform Commission of British Columbia.¹⁸⁴

VII. Points to Ponder

Before concluding, the author would like to raise a number of miscellaneous points which space dictates cannot be explored fully but answers to which may prove illuminating. Throughout research for this paper, one of the most interesting, if at times frustrating, elements has been the lack of a balanced and well researched inquiry into the desirability and form of an electronic register. There was, for

¹⁸² Bennion et al, above n 11, 1024.

¹⁸³ Griggs, above n 1, 7.

¹⁸⁴ Duncan & Christensen, above n 158, 23.

example, no Law Commission report. Indeed it would seem that the whole project has been departmentally driven, albeit with the support of Cabinet and the New Zealand Law Society.¹⁸⁵ This is a concerning fact because, if it is accurate, then there has been no 'independent' examination of the effects and consequences of moving to an automated register on the practitioners involved and on the law itself. The entire process has been foisted on practitioners with very little consultation. It must be said that whenever one reads information sheets both from LINZ and the NZLS, the little cynic inside sits up and says, 'They are trying very hard to sell this to me; I wonder why?' There are a number of advantages to an electronic register which are often mentioned by those advocating the change. These include but are not limited to:¹⁸⁶ reduction in the cost of maintaining the Land Transfer offices; greater accuracy of the register; reduced risk of fraud; and, the elimination of paper.¹⁸⁷ These advantages apparently will result in the holy grail of marketers, that of making everything cheaper. However, it is not readily apparent that any, or all, of these advantages have actually happened. There can be no doubt that it must be cheaper to maintain the Land Transfer Office given that many of its regional offices have now closed. This can be compared to Queensland where the advent of electronic conveyancing encouraged the opening of a greater number of Land Title centres throughout the State.¹⁸⁸ One feels a degree of sympathy for the rural New Zealand conveyancer who, on the day of settlement and when the computer has crashed, realises that he or she needs to drive seven hours to the nearest office to register using paper. However, greater accuracy of the register and reduced risk of fraud are more tenuous suggestions. Time will tell: nothing the author has read makes a convincing argument for either of these two statements. Fraud might be harder in some respects but it will be easier in others and potentially the scale on which it could be committed is exponentially greater. Furthermore, opinion in both British Columbia and Ontario is that manual checking by staff

¹⁸⁵ Bennion et al, above n 11, 188.

¹⁸⁶ Griggs, above n 1, 6.

¹⁸⁷ Ibid.

¹⁸⁸ Christensen & Stickley, above n 153, 215.

is more likely to reduce errors in the register by picking up mistakes and errors than is leaving it to the computer.¹⁸⁹ Moreover, it is submitted that a reduction in paper is one of the greatest myths perpetrated by those in favour of this system. It is true that LINZ no longer has to deal with anywhere near the amount of paper as previously. However, the paper has not gone away. It is now diffused throughout the archives of all the conveyancers in New Zealand. To ensure that there are no disputes about whether, or not, they have authority to sign a particular electronic document, it is required that solicitors ask clients to sign a paper copy Authority and Instruction form as well as other documents relating to the transaction. This is paper which must be kept by the conveyancer. Furthermore, anecdotal evidence suggests that some practitioners are so concerned about Landonline being down on settlement day that they have taken to filling out the paper transaction forms as well, as a backup! This is particularly important as it is contended that reductions in clerical labour and the preparation of paper documents will provide the bulk of the anticipated savings.¹⁹⁰ This means that there is unlikely to be any saving in the preparation of paper documents and it is mandated that they be kept for *ten* years. These are factors that will either increase or maintain current costs for the conveyancer and, by extension, the client. The Government will however save a considerable amount, especially if, as is suggested, it will be able to pass on most of the costs of guaranteeing the system to the conveyancer.

Secondly, professional indemnity prices are apparently coming down. It is submitted that if insurance companies were aware of the onus that is now placed on conveyancers to certify all eDealings, they might be somewhat more reticent before offering to cover practitioners. It will, after all, be the insurance company that pays. It must not be forgotten that the *Rules of Professional Conduct* make lawyers personally responsible for all certifications. Given the structure of the new system, it

¹⁸⁹ Low, above n 2, 61.

¹⁹⁰ R Perry, 'Bricks and Mortar: The Real Cost of IT-Weighing Up the Financial and Time Savings of the Transaction to Electronic Conveyancing - and What Will the Real Cost Be' (2001) 98 *Law Society Gazette* 30.

could be said that New Zealand has shifted from a scheme of State guarantee of title to a scheme of title insurance by proxy.

Finally, it was Sir Robert Torrens' intention that the lawyer's monopoly in land dealings could be broken. However, there is the potential for electronic conveyancing to become the domain of solicitors exclusively. Not only do the certification requirements require a conveyancer (who is almost exclusively a solicitor), but, due to the risks outlined in this paper, it may be that indemnity insurance becomes so expensive that it is only solicitors, who can afford to pay for the risk by spreading their costs among all their clients, that can afford to practice in this area. Certainly the days when one could walk into the land titles office and submit an instrument by hand will be gone.

VIII. Conclusion

The purpose of this wide-ranging article has been to explore the changes to the conveyancing system ushered in by the advent of an automated register. An attempt has been made to show that despite the many perceived advantages of an automated register, the disadvantages cannot be understated.

Torrens' Philosophy

The paper began by reminding readers of the fundamental points about the system. Torrens had a series of grievances he wanted to solve and his system, with its mirror, curtain, and insurance principles, largely did so. They gave rise to a system that has qualities of certainty, integrity, reliability, simplicity and economy. The qualities are buttressed by the principle that registered proprietors have an indefeasible title that is guaranteed by the State. Within this matrix, the register is essential. After all, what you see is what you get.

Comparison of Automated Registration

Because Torrens' system proved so successful, it spread around the world. It is no surprise then to find other jurisdictions grappling with the best way to transfer from a paper environment to an electronic environment. Through an overview of the systems developed by various jurisdictions, it was endeavoured to show that there are two different approaches to the automation of a register: minimalist and reformist. Examples of the minimalist approach appear in British Columbia and Queensland where the system allows practitioners to complete the same old paper forms in a new electronic format. The advantage of this approach is that it does not fundamentally change existing conveyancing procedures or the law of title registration.¹⁹¹ Examples of a reformist approach appear in Ontario and New Zealand where conveyancers can undertake all steps of the process in an electronic environment and where there have been significant changes in the process and practice of conveyancing. While this approach provides a flexible technological framework for a range of transactions, it is submitted that greater consideration of the impact of the system on the conveyancing process should have been undertaken. In particular, the revolutionary step, which New Zealand alone has taken, in allowing conveyancers to update the register, without any examination by the Registrar, is worrying. What this comparison has showed is that while all the systems are different, all except New Zealand are similar in that they all involve a final examination by the Registrar before registration.

Fraud and Mistake

As the analysis of Torrens' philosophy indicated, the key feature of Torrens title is indefeasibility of title and the state guarantee accompanying it. Compensation is payable if that guarantee is not met. However, it is submitted, as the analysis of fraud and mistake shows, that this central feature of the system has been to an extent overlooked in the creation of the new system. Many have argued

¹⁹¹ Christensen, above n 3, 6.

that electronic title actually complements indefeasibility. This is correct. The registration of documents, thanks to computerisation, is much faster and more efficient. Under the doctrine of immediate indefeasibility, electronic lodgement of documents ensures protection of an interest quickly, eliminating the registration 'gap'. However, the argument that automation will eliminate fraud is tenuous at best. While the ability of 'trusted agents' to commit fraud by obtaining the certificate of title will be minimised, there is a real danger that third parties may be able to commit fraud on a large scale through infiltration of the computer's security system, or by sophisticated identity fraud. As the example cited from the *New Zealand Herald* shows, it is already happening. So, whilst technology should allow the possibility of fraud to be minimized, it potentially allows those committing fraud to offend on a wider scale thus bringing into question the security and stability of the register. There will continue to be the problem of fraud under an automated register. However, what is most concerning is how the provisions of the new system place such an increased onus on practitioners. The primary safety check in the whole process is now the conveyancer. The practitioner must now satisfy very strict attestation requirements, certifying that the identity of the client is correct and the information being submitted is accurate. In addition to the fact that most forms of identification are issued by bodies whose primary responsibility is not the accuracy of that identification, the ability of the practitioner to directly update the register, without examination by the Registrar, increases the risk exponentially. Not only will conveyancers need to be far more careful but there is the very real risk they will become liable for any fraud or mistake which is registered. The new form of signing using an electronic signature and public key infrastructure should eliminate some of the risk, but there is always the risk that a digital certificate may be stolen or that the conveyancer may be duped. It should be noted that a system could have been designed that gave parties far more control and direct involvement in the process through the utilisation of a 'land card'. Such a card would be used by a party to actually complete the transfer rather than relying

on authorisation and consent. While probably more expensive at first instance, such a system may have proved cheaper in the long run. The practitioner is now exposed to real risks and one of the most significant, it is submitted, arises from the potential changes the new system will have for the operation of the compensation provisions of the *Land Transfer Act*. As was argued, in combination with strenuous certification requirements, the ability to change the register will have a profound effect on the compensation provisions underlying the system. The Registrar, it is submitted, will no longer be liable for any mistake under s 172(a) of the *Land Transfer Act 1952*, because he or she has no responsibility to check the information entering the register. In addition to concerns about who is then liable, this situation raises important questions about how such mistakes could be removed from the register. While the Registrar and High Court have extensive powers under ss 80, 81 and 85 of the *Land Transfer Act 1952*, the application of these provisions where the conveyancer is in error is uncertain. Moreover, if they are utilised, and it is not clear that they can be, this may have an acute effect on the integrity of the register. Does the public really want the Registrar to be able to change the register because he or she thinks there has been a mistake? It is submitted that urgent thought should be given as to how this situation can be resolved. The potential for an activist Registrar to run amok is increased by the current system. Moreover, regard should be had to situations that may have previously only been an issue for the Registrar. What would happen if a conveyancer wrongly registered a mortgage over Maori Freehold Land without the consent of the Maori Land Court? Is there any provision for this to be resolved? On whose authority might such a problem be resolved? What process should be followed? These are important questions, which deserve answers. Furthermore, even in the event of fraud, rather than mistake, it is likely that the practitioner will be liable for at least some of the costs. If there is a successful claim under s 172(b) of the *Land Transfer Act*, it seems inevitable that the Crown will attempt to subrogate its liability using s 175(1A) to hold the practitioner responsible for ensuring identities and information are correct.

Muir has argued¹⁹² that such criticisms, if valid, would portray a very dim view of the competence and integrity of the legal profession. In his opinion the reality is somewhat different as lawyers have long had a role as trusted professionals in the conveyancing process. One wonders why, if lawyers are so competent, there used to be so many documents rejected by the Land Transfer Office?

However, the question is not whether lawyers are competent to use the system. There can be no doubt that, at best, mistakes will happen, and, at worst, deliberate malpractice will occur. The question then is who will bear the cost? It would seem that currently it would be practitioners, and, by extension, their insurers. This is a marked change from the system that previously operated. To those who feel that the argument is academic, it should be pointed out that, as risks for practitioners increase, so will costs for clients. There are a number of questions to be answered in the current system. Who will be responsible? Who will pay? And, can people use the Torrens system secure in the knowledge that if errors do get onto the register they will not be left out of pocket? It is submitted that this is no longer a certain proposition. For those people contemplating buying or selling property, it may be prudent to invest in some type of title insurance in order to avoid lengthy litigation and costs. If this were the case, the whole system would have come full circle and the law of contract ought be given full reign.

Consequences of a Technical Failure

It is not only the old concerns, albeit in a new light, that conveyancers have to contend with. The new system will inevitably bring with it new problems. Perhaps the most important is the impact upon the integrity of the system of a temporary, or possibly permanent, shut down of the automated register. Any interruption to the operation of the system, leading to an inability to register documents or access the system, has the potential to seriously affect the rights of parties to a transaction and

¹⁹² R Muir, 'Electronic Registration: The Legislative Scheme and Implications for the Torrens System in New Zealand' in Grinlinton (ed), *Torrens in the Twenty-First Century* (2003) 321.

compromise the integrity of the whole registration process. As was illustrated, this has caused problems in other jurisdictions. The law of contract does apply to contracts for the sale of land, and there are other considerations in play above the simple act of registration. As was demonstrated, failure of the system may cause a contract to be breached, to be frustrated, or, it may cause a term, such as 'time is of the essence', to become useless. These potential problems should be looked at before a major 'difficulty' arises so that the situation is certain and there is the prospect of avoiding costly and indeterminate litigation. It is clear that the automated register will open up new challenges for the law. It is submitted that many of the benefits of the system depend on the ability of information technology specialists to deliver a system that is largely infallible. However, very few institutions are famed for infallibility, and computer systems are not generally on that list. Therefore, it is submitted that Parliament should amend the current legislation so that the position is certain. This intervention should follow the British Columbia model. With greater reliance being placed upon technology to conduct business, it is imperative that the effect of computer failure be considered worthy of legislative intervention.

Points to Ponder

In a paper of this nature, it is only possible to indicate briefly some of the more important questions raised by this area of the law. In addition to fraud, mistake, remedy, compensation and failure, there are several other areas that deserve further exploration. In particular, an assessment of the accuracy of some of the claims made in support of the system would be fruitful. It may be that automation of the register will result in cheaper, safer and generally more efficient conveyancing, but the evidence for this is somewhat sketchy. Furthermore, if insurers were aware of some of the risks associated with the new system, costs for all involved may rise considerably. It is inevitable that insurers will become conscious of these concerns, and this may eliminate any savings gained through the move away from a paper based system. Finally, the extent to which the system has been designed to work

only if the conveyancer happens also to be a lawyer is contrary to the entire ethos of the Torrens scheme. While it may be that lawyers have been heavily involved in conveyancing since Torrens' time, it seems a shame that along with such revolutionary changes a move was not made toward an inclusive registration system, which enabled those people participating in the conveyancing process the chance to achieve an increased degree of autonomy.

Concluding Points

The contention of this paper is not that the automated registry is bad *per se*. It is not. It has the potential to be a success. Theoretically it is possible to maintain the integrity of the Torrens system and enhance the system through greater access to information and a faster and more reliable registration process. However, it is submitted that some changes must be made to ensure that the system is still guaranteed by the State, not the individual user, and can respond in the event that it is inoperable for any period of time.

In researching this paper it has become increasingly clear that there is little basis for the apparent confidence in the system shown by those who created it. There is no certainty that the system is going to work without problems. In fact it seems inherently clear that it is only a matter of time until there are serious problems. Land Information New Zealand is a leader in its field but it is unclear why such a revolutionary system was chosen. As the comparison with other jurisdictions showed, New Zealand is the *only* jurisdiction that allows practitioners to update the register without examination by the Registrar. The Registrar no longer has a role and is no longer bound to compensate for, or fix, mistakes on the register. It appears to the outside observer that rather than build the system on the bedrock that the Torrens system has become, Land Information New Zealand has renovated on sand. It is submitted that the majority of the problems come down to the inspection of documents. This must be treated with more caution. The role of the Registrar has until recently been pivotal. The effect

of the diminution of this role, it is submitted, will have severe repercussions. Serious thought should have been given to these considerations before any change was made.

It is certainly an interesting time to be working in the area of conveyancing. While at times this paper has been critical, it remains to be said that the move to an automated register has the potential to be highly positive. However, it is less clear that the system adopted needed to have been so revolutionary. Land Information New Zealand has moved further toward true automation than any other jurisdiction, but the cost of this is one that it appears users will have to pay. In the 1850's, Torrens stated that the old system of conveyancing was rotten, it was like a blundered calculation on a slate, in too much confusion for correction.¹⁹³ The author is forced to admit that without intervention there is a serious possibility that similar sentiments could be expressed about the automated Torrens system. Action must be taken so that these thoughts have no need to repeat themselves. One can only hope, that as the legislation underpinning the automated register is refined, those involved realise the precious system that has evolved over 150 years and act so that Robert Torrens' dream of a register that provides certainty and protection can finally be fully achieved.

¹⁹³ R R Torrens (1858-9), cited by S Birrell, J Barry, D Hall & J Parker, 'Is the Torrens System Suitable for the 21st century?' in *Proceedings of 1995 New Zealand - Australia Cadastral Conference* (1995) 7.